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Supreme Court of the United States

OCTOBER TERM, 1954

No. 391

JOHN ALAN TOMLINSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Northern Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition. The opinion of the Court of Appeals in the companion case of *White* v. *United States*, referred to in the opinion in this case by the Court of Appeals, is an appendix to the petition in the companion petition, *White* v. *United States*.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1954. (See Appendix B to this petition, page 33.) The time for filing this petition for writ of certiorari expires October 15, 1954. This petition for writ of certiorari is filed within the time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. The district court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that petitioner possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, philosophical, or sociological views but that they were based solely on the Word of God. (10, 20-25)[1]

He attached documents to his conscientious objector papers, fully showing his status. (27, 29-32)

[1] Figures appearing in parentheses refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom and the numbers are circled.

The local board denied the conscientious objector status to Tomlinson. He was placed in Class I-A. (11) Following a hearing upon personal appearance he was again placed in Class I-A. (11, 35)

On an appeal to the appeal board his case was referred to the Department of Justice for appropriate inquiry and hearing. (54) A secret investigation was conducted by the FBI and a report thereof placed in the hands of the hearing officer. [II 35, 37, 116-117, 132][2] Tomlinson was called for hearing. The hearing officer recommended that Tomlinson be classified as a conscientious objector but that he be required to render noncombatant military service in the armed forces. (58-59)

The appeal board followed the recommendation and denied the full conscientious objector status to Tomlinson. He was placed in Class I-A-O. (11) In the motion for judgment of acquittal petitioner contended that the recommendation of the Department of Justice and the classification by the appeal board were arbitrary, capricious and based on artificial standards and that the denial of the conscientious objector status was without basis in fact. [I 31]

The motion for judgment of acquittal was denied. [I 38] In the motion for new trial complaint was made of the denial of the motion for judgment of acquittal. [I 39-40]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and the recommendation of the Department of Justice and the classification given to petitioner by the appeal board were arbitrary, capricious and without basis in fact.

[2] Numbers appearing herein within brackets preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.

II.

Petitioner claimed classification as a minister of religion as well as classification as a conscientious objector. (6-13) He showed by evidence that he was engaged in the ministry as his vocation. (13-15) The memorandum made by the local board expressing the reasons for the denial of the ministerial claim shows that he was denied a full and fair hearing upon the ministerial claim. The memorandum stated that since Tomlinson had not attended a theological school he could not be considered a minister. (35) Following the personal appearance the local board denied the ministerial classification on November 20, 1950. (35)

In his motion for judgment of acquittal petitioner complained that he had been denied a full and fair hearing upon his claim for classification as a minister of religion because the board applied arbitrary, capricious and artificial standards in considering his claim. [I 29-30]

In the motion for new trial complaint was made of the denial of motion for judgment of acquittal. [I 38, 39-40]

The question presented here, therefore, is whether upon his personal appearance petitioner was denied a full and fair hearing upon his ministerial claim because the local board thought that he did not have a proper background and training for the ministry, inasmuch as he had not attended a theological seminary.

III.

The secret FBI investigative report was in the hands of the hearing officer at the time of the hearing. [II 35, 37, 116-117, 132] While Tomlinson did not make the request to be given a summary of the FBI report, either before or at the hearing, the hearing officer testified that it was always his uniform practice to make and give a summary of the adverse information appearing in the FBI report when the registrants appeared before him for a hearing. [II 137]

During the personal appearance of petitioner before the hearing officer he read excerpts to Tomlinson from the

FBI report that were considered by him to be adverse and unfavorable. [II 58-59] Tomlinson had no way to test whether what the hearing officer read to him was a fair and adequate summary. [II 75-76]

Complaint was made in the motion for judgment of acquittal that the failure to give all the adverse evidence that appeared in the FBI report to petitioner denied petitioner due process of law. [I 33] Complaint was made in the motion for new trial about the denial of the motion for judgment of acquittal. [I 38, 39-40]

The question presented, therefore, is whether petitioner was denied a full and fair hearing upon the hearing before the hearing officer by not being given a full and adequate summary of the FBI report.

IV.

The conscientious objector claim of petitioner was forwarded to the Department of Justice for appropriate inquiry and hearing. (54) A complete investigation was made by the FBI before the case was referred to the Department of Justice for the hearing. [II 35, 37, 116-117, 132] At the hearing the hearing officer had the secret FBI report before him and told Tomlinson that he had it. [II 58]

The hearing officer had previously read the secret FBI investigative report. [II 51] During the personal appearance he read excerpts from the FBI report that were adverse and unfavorable to Tomlinson. [II 58-59] There was no way whereby Tomlinson could determine whether a fair and adequate summary of the adverse evidence in the FBI report was being given to him. [II 75-76]

While Tomlinson did not request the hearing officer to give him a summary of the adverse information in the FBI report the hearing officer testified that in every case where there was any adverse evidence whatever appearing in the report he always made it a practice to summarize the unfavorable evidence and to give it to the registrant at the hearing. [II 137]

At the trial petitioner subpoenaed the FBI report. The Government moved to quash the subpoena. The motion to quash was denied. [I 8-9, 14, 18] The FBI report was produced for the private inspection of the court. The court ordered the FBI report sealed as an exhibit and marked for identification. [I 21; II 24-25, 26, 39, 121, 246-248, 249, 252-253]

The petitioner was denied the right to use the FBI report to determine whether the hearing officer had given a fair and adequate summary of the adverse information appearing in the FBI report.

The question presented here, therefore, is whether petitioner was denied his right to have the use of the FBI report upon the trial to test and determine whether the summary made by the hearing officer was fair and adequate, as he had a right to do, which right is guaranteed by the due-process clause of the Fifth Amendment, the act and the regulations.

V.

At the trial Tomlinson attempted to give testimony for the purpose of showing that he was denied the right to a full and fair hearing upon personal appearance by the local board at the hearing when it denied him the right to discuss his classification, point out material in the file that he believed had been overlooked and to submit new and additional evidence. The trial court erroneously excluded evidence on this point. [II 181-192] He also attempted to show that at the time of the personal appearance the board members were prejudiced against him because of his religion. This evidence was objected to and excluded. [II 194-195] See Appendix C, below, pages 34-41.

In his letter to the appeal board Tomlinson complained of the draft board's denying him the right to a full and fair hearing upon personal appearance. [II 37, 38, 40]

The question presented, therefore, is whether the trial court committed reversible error in excluding relevant and

material evidence offered by petitioner to establish a denial of a full and fair hearing upon his personal appearance before the local board.

STATUTES AND REGULATIONS INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) is involved. Also, Section 6(j) of the act must be considered (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86). See also Section 12(a) of the act (50 U. S. C. App. (Supp. V § 462(a)).

Sections 1622.1(d), 1622.14, 1624.2(b), 1626.25 and 1626.26 of the regulations (32 C. F. R. §§ 1622.1(d), 1622.14, 1624.2(b), 1626.25 and 1626.26 are involved. These are extensive provisions. They are printed as Appendix D, below, pages 41-48.

STATEMENT OF THE CASE

The Facts

Petitioner was born August 13, 1931. (1) He registered with his local board on October 18, 1949. (2, 3) A classification questionnaire was mailed to him on September 1, 1950. (3, 4)

Tomlinson properly filled out the questionnaire. He gave his name and address. (5) In Series VI he stated that he was a minister. He also said he regularly served as such and that he had been a minister of Jehovah's Witnesses since July 6, 1941. He stated that he had been formally ordained on July 6, 1941, at Millville, New Jersey. (6, 12-13)

He explained extensively his method of preaching and teaching and the organization that he represented. He also showed that he was ordained publicly through a formal ceremony. (12-13) He showed that although he was engaged in secular work his secular work was not his vocation but his ministry was his vocation. (14) He submitted a certificate of ordaination. (15)

In the questionnaire he also showed that he was not married. He showed that he supported himself by secular employment as a baker. He gave Walter Boie Pies as his employer. (7-8) In Series X he showed that he had received elementary education and junior high school training. He also said he attended high school for a period of two years. (9) He signed the certificate at the end of questionnaire showing that he was a conscientious objector and requested the special form for conscientious objector. (10) He claimed classification as a minister in Class IV-D. (10)

He filed the special form for conscientious objector that had been mailed to him by his local board. In Series I(B) he certified that he was opposed to both combatant and noncombatant military service. (20) He showed that he believed in the Supreme Being and that this belief carried with it obligations superior to those owed to the state. He showed that Jehovah God and Christ Jesus were recognized by him as the Supreme Powers. He explained this extensively. (20, 24-25) He also showed clearly how it was and when it was that he became a conscientious objector. He showed that his parents had reared him as one of Jehovah's Witnesses and since the age of nine he had been convinced that the belief of Jehovah's Witnesses was the right way.

He showed that the primary source of his objections was the Bible and the Watchtower publications. (21) He showed that he relied on Jehovah God as the one primarily responsible for his guidance. He said that he did this through the Word of God. (21) He explained that normally he did not believe in the use of force but that he did believe it was proper to defend himself and his spiritual brothers. (21, 27)

He showed that the behavior in his life had been consistent with his conscientious objections and he always strove to conform to the commandments of Jehovah, the Almighty God. (21) He stated that he had repeatedly given expression, both publicly and privately, to his friends and others about his conscientious objections. (21) He listed the names and addresses of the schools that he attended.

(21) He gave the list of his employers. (21) His places of residence were listed. (22)

He gave the names of his parents and showed that their religious beliefs were those of Jehovah's Witnesses. (22)

Tomlinson showed that he had never been a member of a military organization. (22) He showed that he was a member of the organization known as Jehovah's Witnesses. (22) He pointed out that the Watchtower Bible and Tract Society of Brooklyn, New York, was the legal governing body of Jehovah's Witnesses. He showed that he had become a member of the organization by baptism. (22, 24-25)

He gave the address of his church. (22) He showed that Shield Halvajian was the presiding minister of the congregation. (22) In a letter he described extensively his position as a conscientious objector. He showed that he was entirely neutral toward the affairs of this world. He showed that he followed in the footsteps of Jesus, who commanded him to keep himself separate and apart from the world. He showed that Christ Jesus commanded him as a Christian follower not to be spotted by the affairs of this world. (22, 24-28)

He then showed that he had no relationship with any other organization of any kind or character. (22) He attached to his conscientious objector form a booklet entitled "Neutrality" and a magazine entitled "Awake!" (27) In addition to this he filed with the local board, along with the conscientious objector form, a statement by his parents, who were Jehovah's Witnesses. They certified that they had trained Tomlinson since childhood in the way that he should go. They reviewed his study at home and also the fact that he had been trained in the Theocratic Ministry School. They then pointed out that he had been duly trained for the ministry and was ordained in 1940. They showed, too, that since the date of his ordination he had been an active minister. They requested the board to classify Tomlinson as an ordained minister. (29-30)

Also accompanying the conscientious objector form was

an affidavit signed by Shield Halvajian. (31-32) This material was received by the board and filed on September 18, 1950. (11)

On October 30, 1950, the local board classified Tomlinson in Class I-A. (11) He was notified. (11) He then wrote the local board for a personal appearance. (32) On November 15, 1950, the local board commanded him to appear on November 17, 1950. (34) This was canceled and the date of appearance postponed. (11) Tomlinson appeared before the local board on November 20, 1950. (11)

Tomlinson attempted to testify upon his trial that he was denied his rights to discuss his classification, point out material in the file that had been overlooked and submit new and additional evidence. The trial court erroneously denied Tomlinson the right to show that he had been deprived the right of procedural due process. [II 181-192] He attempted to give testimony about the prejudice on the part of the members of the local board. This evidence was objected to and some of his testimony was stricken. [II 194-195]

The records of the local board show that the personal appearance was conducted on November 20, 1950. The memorandum shows that Tomlinson attempted to give evidence before the local board. The memorandum shows explicitly that "the local board feels that he does not qualify for such a classification, inasmuch as there has been no Theological training in a school, or background which would make him a minister. They feel that a minister is one who has a regular following, and is ordained." (35) The memorandum shows that prejudicial remarks were made by members of the local board. (35)

The local board, upon personal appearance, reopened petitioner's case as required and thereafter, on reconsideration, placed him in Class I-A. This was the original classification that had been given to him on October 5, 1950. (11, 35) He was notified of this classification on November 27,

1950. (11) Tomlinson duly appealed from the classification in writing. (36)

Thereafter, he wrote a letter to the appeal board, constituting his appeal statement. In this letter he complained to the appeal board that he had been denied his rights to procedural due process before the local board upon personal appearance. (37, 38) He then attempted to argue and explain his conscientious objections. (38-39) He then reiterated he had been denied his right to give any evidence upon the personal appearance. (40) He attached various references from documents showing that he was a minister of religion and entitled to proper consideration by the local board. (41-46)

The local board then sent to Tomlinson a form requesting him to give evidence as to his dependence. He filled this out properly and returned it to the board. (47-49) Then on March 1, 1951, the local board reviewed his case again and stated that there would be no change in his I-A classification. The note shows his case was forwarded to the appeal board. (11) He was notified of this order. (11, 51)

The local board then ordered him to report for a preinduction physical examination. (11, 52) He was found to be physically acceptable. (11, 53) The case was then forwarded to the appeal board. The appeal board then preliminarily determined that he was not entitled to classification as a conscientious objector, which required that the file be forwarded to the Department of Justice for appropriate inquiry and hearing. (11) The appeal board then forwarded the file to the Department of Justice for the procedure prescribed by the statute. (54)

There was then an investigation by the FBI before the case was referred to the hearing officer of the Department of Justice. [II 35, 37, 116-117, 132] The file was thereafter put in the hands of Nathan O. Freedman, Hearing Officer of the Department of Justice, for a hearing attended personally by the petitioner. Tomlinson was commanded to

appear before the hearing officer and he did appear for hearing.

The hearing officer had previously read the FBI secret investigative report. [II 51] He told Tomlinson that he had the FBI report before him. [II 58] He did not, however, show the report to Tomlinson. [II 58] During the personal appearance he read excerpts from the FBI report that were adverse and unfavorable to Tomlinson. [II 58-59] Whether the parts he read from the FBI report were fair and adequate was not definitely established by the hearing officer. [II 75-76] While Tomlinson made no request for the names of the informants and did not know that there was an FBI report before the hearing officer, he did the best he could by showing his background in life as a conscientious objector. [II 99]

Tomlinson had received a notice from the hearing officer that he could request adverse and unfavorable evidence. [II 70-71]

Upon the trial the hearing officer was a witness. He said that in every case where there was adverse information he always told the registrant that he had the FBI report before him and attempted to summarize the unfavorable evidence appearing in the FBI report. [II 137]

In due course of time the hearing officer made a report to the Department of Justice. In his report he showed that Tomlinson sincerely believed that his participation in war was contrary to the laws of God. He showed that Tomlinson believed that laws of God were above the laws of man. He reviewed the Scriptural explanation made by Tomlinson that he was in the world but not a part of it. He put emphasis upon the fact that Tomlinson resisted the idea of being taken away from his preaching work, contrary to the laws of God. The hearing officer then concluded that Tomlinson was like all others of Jehovah's Witnesses. He found Tomlinson to have the same belief as all others of Jehovah's Witnesses. He did mention, however, that, like other Jehovah's Witnesses, Tomlinson believed he had the right to

defend himself but he believed it was wrong to kill. (58-59)

The hearing officer then concluded that, notwithstanding the sincere objections of Tomlinson, the hearing officer felt that "he could render great assistance to our government in some other capacity." The hearing officer then recommended that Tomlinson be put into the army as a conscientious objector to combatant service and be required to render noncombatant military service. He recommended a I-A-O classification. (58-59)

The appeal board then classified Tomlinson on April 30, 1952, as a conscientious objector to combatant service and ordered him to be inducted into the army as a noncombatant soldier. He was placed, therefore, in Class I-A-O. (11) The local board notified Tomlinson of the appeal board classification on May 7, 1952. (11)

He filed a letter with the board requesting a stay of induction because he was appealing for further review. (60, 61-67) However, on July 1, 1952, the local board ordered the appellant to report for induction on July 18, 1952. (11, 68, 87) Tomlinson reported for induction on July 21, 1952. He refused to submit to induction. (11, 85 86)

Form and History of Action Showing Jurisdiction in District Court

The indictment filed in the district court charged the petitioner with a violation of the Universal Military Training and Service Act. It was alleged that after petitioner registered and was classified he was ordered to report for induction. It is then alleged that on or about July 21, 1952, petitioner did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Petitioner was arraigned and pleaded not guilty. [I 4] He waived the right of trial by jury and the findings of fact and conclusions of law. [I 5-6]

Petitioner subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the

act. [I 8-9] The Government moved to quash the subpoena. [I 8-9] An order to show cause was issued to show whether or not the subpoena should be quashed. [I 18] The trial court overruled the motion to quash and ordered the Government to produce the secret investigative report. [I 18] At the trial the court privately inspected the FBI report and held it to be immaterial to any issue and refused to admit the document in evidence. The court ordered the report sealed and prohibited petitioner's counsel from seeing the exhibit. [I 35; II 77-78, 81, 141-142, 246-248, 249-253]

Motion for judgment of acquittal was made. [I 29-34; II 271] The motion for judgment of acquittal was denied. [I 38; II 271] A motion for new trial was filed. [I 39-40] The motion was denied. [I 41; II 274] The petitioner was sentenced to serve a period of four years in the custody of the Attorney General. [I 42-43; II 277] Notice of appeal was timely filed. [I 44-45] The transcript of the record, including statement of points relied upon, was timely filed in the court below.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeals. In those cases the appellants, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. See *Jessen* v. *United States*, 10th Cir., 212 F. 2d 897, where the Tenth Circuit (after following *Taffs* v. *United States*, 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of other circuits with which the holding of the court below (that there was basis in fact for the denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Jessen* v. *United States,* 10th Cir., May 7, 1954, 212 F 2d 897; *United States* v. *Close,* 7th Cir., June 10, 1954, — F, 2d —; *United States* v. *Wilson,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that because the courts in some of those cases discussed the speculations urged on the courts as basis in fact the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case in so far as the statements in the draft board record showing conscientious objection are concerned.

It is submitted, therefore, that there is a direct conflict between the holding of the court below and the holding of other courts of appeals on this question. This gives a basis for granting the writ of certiorari.

II.

An important question of federal law that has not been determined but which should be decided by this Court is also involved. It is whether the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), applies in cases in-

volving conscientious objectors. The court below, in the companion case of *White* v. *United States,* relied on by it in this case, held that the rule in the *Dickinson* case did not apply. The court followed the earlier holding of the Court of Appeals for the Seventh Circuit in *United States* v. *Simmons,* 7th Cir., June 15, 1954, 213 F. 2d 901. The holding of the court below and that of the Seventh Circuit in the *Simmons* case are in direct conflict with *Weaver* v. *United States,* 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, 212 F. 2d 897: *United States* v. *Wilson,* 7th Cir., June 10, 1954, — F. 2d —. In all these holdings it was expressly declared that the rule of *Dickinson* v. *United States,* 346 U. S. 389 (Nov. 30, 1953), did apply to conscientious objector cases. There is a direct conflict, therefore, between the holding by the court below and those by other courts of appeals on this precise point. The question is, moreover, of great public importance to the Government and the people of the United States in the administration of the draft law. For these two reasons there is jurisdiction to grant the writ.

III.

There is involved another important and substantial question of law that has not been determined but which ought to be decided by this Court. It is whether arbitrarily granting only a portion of the conscientious objector claim is illegal. The proof showed and the claim for classification was for the full conscientious objector status. This was the I-O classification. The appeal board found petitioner to be a sincere conscientious objector but it ordered him to do noncombatant military service, to which he objected. See the last two sentences of footnote 4 of the opinion of the court in this case, at page 31, below.

This type of draft board classification has been held by two federal district courts to be arbitrary and capricious,

so as to require an acquittal. See *United States* v. *Relyea,* No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952, and *United States* v. *Goddard,* No. 3616, District of Montana, Butte Division, June 26, 1952. Copies of these opinions appear below, Appendix E, pages 48-51.

It is submitted that the importance of this question warrants the granting of the writ in this case.

IV.

Another important and substantial question of law that has not been determined but which ought to be decided by this Court is presented. It is whether the religious objections to the performance of any governmental work under the act, going beyond objections to military service but including opposition to such service, are basis for a denial of the conscientious objector status. The court below held that because petitioner objected to doing anything, either as a civilian employee of the Government or as one of the military forces and wanted to have no part of the war effort of the nation, and because he did not limit his objections to military service, he was not a conscientious objector.

This holding of the court below was an unduly restrictive interpretation of Section 6(j) of the act. There is nothing in the act or the legislative history of it that indicates Congress intended to limit the religious beliefs of conscientious objectors or prescribe what is orthodox for conscientious objectors. The court below read into the act an illegal importation that conflicts with the intent of Congress. This construction of the law emasculates the conscientious objector provisions to such an extent that it is imperative that the writ be granted in this case to correct the deflection of the court below.

V.

Another important and substantial question of law that has not been determined but which ought to be decided by this Court is presented. It is whether a court of appeals may simulate basis in fact by multiplication of irrelevancies and speculations not proved to be relied upon by the appeal board. It is stated that "attitudes and demeanors which develop at the time of such a person's personal appearance may well be controlling factors." Yet there was no development in the record of disbelief or that petitioner was lying. There was no pointing to anything that contradicted what the petitioner said. The court below relied upon the report of the hearing officer as basis in fact for the denial of the conscientious objector claim. Yet all the hearing officer did was to find that the petitioner and his witness established orally at the hearing exactly what was shown in the written papers. The court below proves that he merely repeated what was in his papers by stating that the summary of the hearing made by the hearing officer "reflects the registrant's general attitude *as expressed in his letters.*"—Italics added.

In the face of the record that there was nothing contradictory in the papers or that impeached what petitioner said, the court below weaves a web of basis in fact around the case by saying that there was a hearing and that since the hearing officer could observe the demeanor of petitioner his recommendation against petitioner was final and unreviewable. The holding of the court below which speculates and presumes against petitioner without a written record is in conflict with *Kulick* v. *Kennedy,* 2d Cir., 157 F. 2d 811, where it was held that if a draft official at a hearing disbelieved a registrant it is necessary to make a memorandum of such disbelief. The court below was not authorized to speculate that the hearing officer judged petitioner adversely because of demeanor. The process of reaching basis

in fact by speculation employed by the court below is so great a departure from federal administrative law that it is of the greatest importance that the writ be granted here.

VI.

There is another conflict between the holding below and that of another court of appeals. It was held that the statement by the local board that it felt petitioner "does not qualify for such [ministerial] classification, inasmuch as there has been no Theological training in a school" did not constitute a denial of a full and fair hearing upon personal appearance. This holding is in direct conflict with *Niznik* v. *United States,* 6th Cir., 1950, 184 F. 2d 972. For this reason the writ should be granted in this case.

VII.

The trial judge erroneously denied petitioner's right to prove prejudicial remarks by board members at his personal appearance. He allowed petitioner the right to say what he told the board himself but he adamantly refused to permit petitioner to show that the board members at his hearing made remarks that violated Section 1622.1(d) of the regulations in hearing his case. This section prohibits prejudice by board members against a registrant on account of his religion. (*Niznik* v. *United States,* 6th Cir., 1950, 184 F. 2d 972) Petitioner several times attempted to give testimony about the remarks made by the board members showing prejudice on their part. Each time the trial court refused him the right to testify about the prejudicial remarks. He persisted in limiting the petitioner to what the petitioner said to the board only. See the excerpts from the transcript of proceedings printed as Appendix C to this petition.

The court below held that these discriminatory rulings by the trial court on what could be shown at the personal appearance (only part but not all of what was said at the

hearing) was not reversible error. Had petitioner been allowed to give his evidence he would have established as rank a violation of procedural due process as was shown in *Niznik* v. *United States*, 6th Cir., 1950, 184 F. 2d 972. In that case, on facts identical to those petitioner attempted to prove, it was held that the local board denied the registrant his right to procedural due process of law. Petitioner was at the very least entitled to a fair opportunity to prove a case of violation of procedural due process at his trial. The trial judge denied procedural due process at the trial by refusing petitioner the right to show the board had deprived him of procedural due process on the hearing.

This question of procedural law in the trial of draft cases in federal district courts is an important one. It is very substantial. This question, which has not been decided by this Court, ought to be determined by it. To that end the petition for writ of certiorari should be issued in this case.

VIII.

Another substantial and important question of federal criminal procedure that ought to be determined by this Court is involved here. It is that the exclusion from evidence of the secret FBI investigative report was reversible error. The FBI report was sought at the trial for the purpose of determining whether the hearing officer had given to the petitioner a full and fair summary of the adverse evidence from unknown informers. The petition for writ of certiorari should be granted because the decision below is in conflict with an earlier holding by the court below in *United States* v. *Gray*, 9th Cir., 1953, 207 F. 2d 237, 241-242. This same question is presented to this Court in *Simmons* v. *United States*, No. 251, October Term, 1954. The Solicitor General has responded to that petition by consenting to the granting of the writ to have it determined because of its importance. Since the same important question is involved here, then the same reasons exist for the granting of the

writ in this case. It is suggested that the Court should grant the writ in this case.

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAYDEN C. COVINGTON

Counsel for Petitioner

October, 1954.

APPENDIX A

Opinion of Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John Alan Tomlinson,
Appellant,

vs.

United States of America,
Appellee.

No. 13,892

Sep. 15, 1954

Appeal from the United States District Court for the Southern District of California, Central Division.

Before Stephens, Bone and Pope, Circuit Judges.

Pope, Circuit Judge:

Tomlinson, convicted of refusing to be inducted in the armed forces of the United States, in violation of the Universal Military Training and Service Act, 50 App. U.S.C.A., Sec. 462, upon this appeal asserts that he should have had judgment of acquittal on the ground that the action of the boards which classified him was arbitrary and capricious, and that it was without basis in fact.

Tomlinson was placed in Class I-A-O (conscientious objector available for non-combatant military service only). The points which he makes here relate to (1) his claim before the draft boards that he should be classified as a

minister of religion, and (2) his claim that he should have been classified as a person conscientiously opposed to both combatant and non-combatant military service.

Tomlinson's argument with respect to his ministerial status is not that denial of such a classification was without basis in fact, rather it is that he was denied a full and fair hearing upon this point when he appeared before the local board. In this connection it is said that the trial court erred in excluding relevant and material testimony offered for the purpose of showing that the local board thus refused him the hearing he was entitled to. As for the asserted rejection of offered testimony, it is noted that the appellant's brief wholly fails to comply with that portion of our Rule 18, sub. 2(d), which states the requirements for making a specification of error of this kind.[1] Nevertheless, we have examined the record in this connection.

Appellant says that he attempted to give evidence to show that when he appeared before the local board he was denied the right to discuss his classification and to point out material in the file which he believed the board had overlooked. He argues that he was denied the opportunity to introduce evidence to show that he sought in vain to submit new and additional evidence when he was before that board.

The selective service file discloses that registrant supplied the local board with voluminous written statements relating to his claims for exemption. He attached to his original questionnaire a closely typed letter, more than two pages in length, containing an extensive statement of his claim as to his ministerial status, his right to deferment because of some dependent sisters, and his conscientious objection. This was supplemented by literature from the

[1] 'When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found.'

Watchtower Bible and Tract Society. A few days later he filed his SSS Form 150 relating to his claims of conscientious objection. To this were attached an additional four and one-half page exposition of his views as to his ministerial and conscientious objector status, written statements of his parents, and of a certain "company servant" of the group of Jehovah's Witnesses of which he was a member. Following his personal appearance before the board and his continuance by the board in Class I-A, he appealed to the appeal board, accompanying his appeal with an additional closely typed three and one-half page letter making further statements and arguments in support of his appeal, and this in turn was accompanied by extensive printed material.

At the trial Tomlinson was shown the page of his file which contained the local board's minutes of his personal appearance before the board. He then testified as follows: "Q. By Mr. Shire: Mr. Tomlinson, will you state to the court anything that you stated to the board which does not appear in this record on page 35 of Exhibit 1? A. I attempted to answer one of their questions about would I go into the Army and fight for the country? When I attempted to use the Bible, as soon as I opened it up, why, one of the board members said, 'Never mind what some man said about it. Let us hear what you have to say.' So then I said, 'This is God's word, the Bible, and this is what I base my beliefs upon.' And I asked them how they could classify me properly unless they knew what I based my beliefs upon. And I do not see that in here. Q. Was there anything else that you said to them that does not appear there? A. Yes. I explained to them that I have had a religious training and background and that I was qualified for a minister's classification. And I showed how that I had been raised as one of Jehovah's Witnesses and that I was ordained on July the 6th of 1941, and I even had paper clippings and things there with me at the time which I was unable to present because of their changing the subject and going into

something else. Q. Is there anything else? A. I don't recall anything else right at the moment."

Thereafter the court inquired of the witness whether he furnished anything to the board which did not appear upon the board's minutes and the witness answered: "Well, I explained a little more in detail than it has here, that I was in the position that Christ Jesus took when he was on the earth; that I considered those of my brothers were the ones who believed and had like faith, a faith like my own, because they asked me if I would fight to defend my family and my friends, and I said that I would, because I do believe in fighting and defending myself and friends and family, because they are of like faith."

His attention was then called to his four page letter to the appeal board and the following occurred: "The Court: My question is this: Is there any information which you furnished the local board at the personal appearance hearing which is not embraced in your letter to the appeal board, which pages you have last identified in Exhibit 1? Do you understand my question? The Witness: I believe I do. The Court: In other words, did you give the local board anything that you did not cover in your letter, which we have identified here, to the appeal board? The Witness: Well, I have not read this appeal letter for a little while and I wouldn't be able to say exactly."

This was the end of his testimony with respect to what he furnished or attempted to furnish the local board and there is no further proof or offer of proof upon this subject.

We find no basis whatever for any contention that the court excluded any offered testimony in respect to appellant's claim that the local board denied him a full and fair hearing. There is also absent from the record anything to indicate that the local board did in fact unfairly or unduly restrict or limit presentation upon his personal appearance before it. What happened here is almost precisely what happened to the registrant in *Martin* v. *United States*, 4 cir., 190 F. 2d 775, 778, in which the court held that the

registrant could not complain because the board stopped him from reading passages from the Bible when the whole matter was fully covered by his letters.

An effort is made to show that appellant's opportunity for a full hearing before the local board was limited in another respect. This contention is based upon a portion of the minutes of the local board relating to appellant's appearance there on November 20, 1950, reading as follows: "Registrant presented facts of religious training, and belief. States that he is a Minister, but the Local Board feels that he does not qualify for such a classification, inasmuch as there has been no Theological training in a school, or background which would make him a minister. They feel that a Minister is one who has a regular following, and is Ordained." Placing his emphasis entirely upon that portion of the foregoing minute entry which refers to "no theological training in a school" and to the word "ordained," registrant says that this discloses that the board, in disregard of the law, manufactured its own definition of minister of religion. The effect of this, he says, was to deny him a hearing upon this issue. Says appellant: "The contention here is not that the ministerial claim was denied without basis in fact. It is that appellant has been denied his rights to a full and fair hearing upon his personal appearance." If the statement of the local board had no meaning other than that the board was requiring a showing of theological training in a school, or that a minister must necessarily be ordained, we would have little difficulty, if that question were before us in concluding that the local board's statement was incorrect as a statement of law.[2]

However, the board's minute entry is not susceptible of an interpretation that the board regarded theological train-

[2] The Regulations, Title 32, (now Sec. 1622.43), recognize that a minister of religion entitled to exemption may be either a "regular minister of religion," or a "duly ordained minister of religion." Neither the statute nor the Regulations make any requirement of theological or school training.

ing in a school as a necessary prerequisite for a minister. In substance, what the local board says was that there had been *neither* theological training in a school *nor* background which would make him a minister. The board further referred to his lack of a "regular following."[3]

True, the reference to ordination was incorrect, but any error which the local board may have made in this respect was precisely the sort of thing which the appeal board was set up to correct. Here the whole record went to the appeal board, along with Tomlinson's four page letter to that board. In that letter he dealt with the precise question, quoting the statements made by General Hershey concerning the position of Jehovah's Witnesses as recognized ministers and enclosing printed material containing the same quotations. If the local board erred in its use of the word "ordained," such error was cured by the action of the appeal board under the rule of *Cramer* v. *France*, 9 cir., 148 F. 2d 801, *Tyrrell* v. *United States*, 9 cir., 200 F. 2d 8, and *Reed* v. *United States*, 9 cir., 205 F. 2d 216.

Another contention is that at the time of his personal appearance before the hearing officer after his case had been appealed to the appeal board, the officer failed and refused to give appellant a full and fair summary of the

[3] In essence what the board said was that it rejected registrant's claim to be a minister. That the board, presumably composed of laymen, did not use the most apt language to evidence this disapproval, does not alter the essential character of its ruling. Indeed, the registrant's showing of a ministeral status was wanting in substance. His showing was to the effect that he was ordained at a public ordination ceremony on July 6, 1941. This was confirmed in a letter from his parents. On that date the registrant was not yet ten years of age. His letters to the Board specified in minute detail the extent, nature and character of his religious work. In general, his showing was that he spent his evenings in Bible study, in visiting intended converts, and "on the street corners of Inglewood." He made no showing that he was a shepherd of any flock. On the other hand, he appears to have been a member of a group led by one Halvajian described as a "company servant" of the congregation known as the Inglewood company. The registrant held a full time job at a bakery. On the whole, the showing was far less persuasive than that made by Hagaman in *United States* v. *Hagaman*, 213 F. 2d 86, 92-93.

FBI investigative report concerning him. This contention has no basis in the record. An attempt is made to argue that there must have been adverse and unfavorable evidence appearing in the FBI file for the reason that the hearing officer made a recommendation that Tomlinson be placed in a I-A-O classification thus declining to recommend the I-O or the full conscientious objector classification.

The record of the hearing officer furnishes no support for such a contention. That officer's report would indicate that it was based upon the officer's questioning of the registrant himself. There is nothing to show that the hearing officer drew any conclusions from an FBI report. Such a report is not mentioned. The hearing officer's report bears internal evidence, when compared with the registrant's own statements to the local board and to the appeal board, that its conclusions are drawn from what the registrant told the hearing officer. The hearing officer was called as a witness for the defendant. He testified that he had no recollection of appellant's hearing or appearance before him. As hearing officer he had held many hearings with respect to numerous registrants. His testimony amounted to saying that he assumed that the hearing of Tomlinson proceeded in the usual manner; that he usually gave to such registrants information from the FBI reports which were adverse to them providing the registrant asked for it; he did not remember whether this registrant made such a request or whether he asked to see the report. The witness testified that he had no particular recollection of this case.

It is asserted that the court below committed error in refusing to receive in evidence the FBI report which was furnished to the hearing officer. This is the same contention which was made on behalf of the appellant in the case of *White* v. *United States*, ... F. 2d .... (decided .....). For the reasons therein stated we hold that the contention thus made here is without merit.

Finally it is contended that there was no basis in fact for the classification which this appellant was given. The

local board classified him I-A. Upon his appeal the board of appeals determined that appellant was not entitled to a classification as a conscientious objector, and his file was forwarded to the Department of Justice in the usual manner. The hearing officer after a hearing which was attended personally by the appellant recommended that Tomlinson be placed in Class I-A-O. This is where the appeal board placed him. When he was ordered inducted into the armed forces for the limited service thus called for, he refused to submit and this prosecution followed.

Appellant assumes the position that the record before the appeal board permits nothing except a I-O classification, that is, classification as a person conscientiously opposed both to combatant and noncombatant service. The contention is that the appeal board in concluding that the registrant belonged in Class I-A-O, that is to say, a class made up of persons available for noncombatant service, acted without basis in fact.

We note here that the board found that registrant was in fact a conscientious objector. It is evident that the board raised the question: conscientious objector to what? In *White* v. *United States, supra,* this court had occasion to point out that a draft board having to do with a claim of conscientious objection is necessarily called upon to evaluate a mental attitude and a belief. A board or body called upon to determine to what extent and how far an individual's conscientious objections go, may well have great difficulty in coming to a conclusion. Surely the board is not concluded by the mere assertion of the registrant. Attitudes and demeanors which develop at the time of such a person's

personal appearance may well be the controlling factors. In this instance it is plain that the appeal board's conclusion was based primarily upon the report of the hearing officer. Such a report may furnish the basis in fact which supports the board's action. *Kent* v. *United States,* 9 cir., 207 F. 2d 234, 237; *Roberson* v. *United States,* 10 cir., 208 F. 2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant's file which was transmitted with the appeal.

As we have previously indicated, the hearing officer's report is apparently based upon information obtained by that officer at the time the registrant appeared before him. The officer summarized the information thus obtained as follows: "Of course like all other Jehovah's Witnesses he believes that wars are contrary to God's wishes and he believes God's laws should take precedence over man's laws. His contention is that although he is a member of Jehovah's Witnesses and they are in this world, they are nevertheless entirely separate and apart from it. They are here to do ministerial work in carrying the message of Christ, and if he were taken away from this work to serve in the armed forces, the work of carrying the message would be hindered.

"Registrant had a witness with him by the name of Halvajianie Shield [sic], who is also a member of Jehovah's Witnesses. He is also a conscientious objector and served a sentence for not complying with the rulings of his draft board.

"Registrant helps support his family, insists that he would not kill, and that his mother, father and sisters are all members of Jehovah's Witnesses."

This summary reflects the registrant's general attitude as expressed in his letters.[4]

The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs "of this world." True he is conscientiously opposed to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying the "message" and doing what he chose to call "ministerial work." We think that in drawing the line where it did, it cannot be said that the appeal board

[4] The letter attached to his conscientious objector Form 150 stated registrant's views at great length. It may be summarized as follows: first, a demonstration from Scripture and otherwise that there is a God; next, a similar demonstration that there is a Devil; a statement that "this world" is ruled by the Devil, and a Christian cannot be a "part of this world"; so I am neutral as to all wars waged by the nations of this world: "While I object to participation in combatant and noncombatant service I do not object to the nations of this world in carrying on wars"; that is their right. "Nevertheless I must obey God rather than man and I quote Acts 5:29 'We ought to obey God rather than men.'" "Since no man can give life he also does not have the right to take life unless he acts in harmony with God's word; He says at Exodus 20:13 'Thou shalt not kill.'" "Even if I kill a person who did not believe the same as I, or maybe even in God, I would be breaking God's everlasting covenant." The letter followed with an exposition of the proposition that registrant was not a pacifist because he believed in theocratic wars and it concluded with a reassertion of his claim of ministerial status. In his letter to the appeal board, registrant repeated these views saying: "I believe in a Supreme Being and that to serve him involves duties that are superior to those arising from any human relation. Jehovah God's laws state that it is wrong to kill and for that reason I cannot take part in combatant or noncombatant training and service." He followed this with numerous quotations from the Scriptures to the effect "Thou shalt not kill," etc.

acted without basis in fact.[5] The board could well understand from appellant's representations that his objections would include such tasks for a government of "this world" as fighting forest fires or building roads. An objection, on religious grounds, to any assignment which would take the registrant away from his missionary activities, is not an objection which the Act recognizes.

The judgment is affirmed.

[5] According to the Board's minutes Tomlinson told the local board at the time of his personal appearance that he would defend his home or his family even to the point of killing. In his letter attached to his Form 150 he expressed the view that theocratic wars had Biblical approval and also there said: "If a person attempts to harm me or my spirtual brothers and sisters I have the perfect right to defend myself and said spiritual brothers and sisters in behalf of the upholding of God's government." In a supplemental brief the government contends that one who believes in theocratic wars or one who believes in the use of force to defend himself and family cannot be a conscientious objector because he is not opposed to "participation in war in any form." This argument has been rejected in a number of cases including *Taffs* v. *United States*, 8 cir. 208 F. 2d 329, *United States* v. *Hartman*, 2d cir., 209 F. 2d 366; *Annette* v. *United States*, 10 cir., 205 F. 2d 689. In reaching our conclusions here we have not taken into consideration these statements of the appellant, and have disregarded the arguments of the government referred to in this note.

APPENDIX B

JUDGMENT OF COURT BELOW

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 13892

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly sumitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 15, 1954.

APPENDIX C

Excerpts from Official Transcript of Proceedings at the Trial

[103]

Q BY MR. SHIRE: Will you state whether or not you had a personal appearance before your local board?

MR. REAL: I object to that, your Honor, upon the grounds it is immaterial and irrelevant to the issues of this case, and the file is in evidence and any personal hearing would be reflected in that file, the character of the personal appearance hearing, your Honor.

THE COURT: Is there any contention that this defendant requested a personal hearing which was not granted?

MR. SHIRE: No, your Honor. There was a personal hearing. I shall ask him now concerning what went on at the personal hearing, whether or not he had one, and what went on at the personal hearing.

THE COURT: Overrule the objection to the pending question. You may answer whether or not you had a personal hearing.

A Yes, I did.

* * *

[104]

Q BY MR. SHIRE: Who was present at that personal hearing at the local draft board?

THE COURT: Do you accept the stipulation as to the date?

MR. SHIRE: Yes, I do. It is in evidence, of course.

MR. REAL: Your Honor, we will object to the line of

questions as to his personal hearing on the grounds it is irrelevant to the issues in this case under the *Cox* case which limits the issues of this case to whether or not he received the notice of induction and whether he refused to submit.

THE COURT: Sustained.

MR. SHIRE: I understand by that I am precluded from going into the personal hearing?

THE COURT: Yes, that is the intent of the ruling.

MR. SHIRE: And what took place, then, in the conversations, your Honor, so I won't ask a lot of questions on that. May I have just a moment, if your Honor pleases? No further questions on that.

THE COURT: Cross examination?

* * *

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MR. SHIRE: In connection with this matter, your Honor has asked for citations. I should like to give your Honor some citations upon this point, if I may, please.

THE COURT: You may.

MR. SHIRE: I would like to cite United States v. Laier, 52 Fed. Supp. 393, in the Northern District of California;

United States v. Peterson, 53 Fed. Supp. 760, from the Northern District of California;

Niznik v. United States, 173 Fed. (2d) 328, Sixth Circuit Court of Appeals;

Niznik v. United States, 184 Fed. (2d) 972.

It is my understanding, if your Honor pleases, that if the local board denies a full and fair hearing by the making of any prejudicial statements or by unreasonably cutting the registrant off from giving all his testimony, or if they have prejudged his case and indicate that they have pre-

judged his case upon a basis that they give everybody of a certain belief or certain religion, certain treatment, that there is a denial of procedural due process; and I believe that these cases support me upon that point, if your Honor pleases.

THE COURT: The Niznik case is the leading case, I take it, on that point.

MR. SHIRE: Yes, your Honor. I further make the point that the Selective Service System rules and regulations require that a full and complete report be made by the local board, a member of the local board, of the proceedings upon personal appearance, and unless this is complied with substantially, there is a denial of procedural due process because, first, the hearing officer and the appeal board and others have no way of knowing what occurred at the hearing.

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[170]

BY MR. SHIRE:

Q Mr. Tomlinson, did you have a hearing before your local board, an appearance, on November 20, 1950?

A Yes.

Q And did you go there with anyone else or did you go alone?

A I went with someone but they refused him to come in.

Q I mean into the hearing room, did you go in there alone?

A Yes.

Q Regardless of what else happened. Who was in that room with you, do you know?

A Three board members and the board clerk and myself.

Q Will you tell us what took place at that time?

MR. REAL: If it please your Honor, I would like to object to that question on the grounds it is irrelevant and immaterial; and, further, that this line of questioning is on a moot question, since there is in evidence on page 36 of Government's Exhibit 1 a notice of appeal by the defendant where he states that he felt that the local board had overlooked some information contained in his file, and information which would result in a change of his present classification, and that the appeal board was aware of that situation and that they considered that in their determination, and that is the reclassification from I-A to I-A-O, and therefore the appearance before the local board was a moot question on this particular trial.

THE COURT: Did the appeal board change his classification?

MR. REAL: Yes, your Honor, it did.

THE COURT: Did not that render the matter before the local board *functus officio*, so to speak?

MR. SHIRE: No, your Honor, for this reason—

THE COURT: Does not the classification of the appeal board supersede the action of the local board, under *Cramer* v. *France*, 148 Fed. (2d) 801?

* * *

[173]

MR. SHIRE: My opinion is this, your Honor, and this is my reasoning: that while the classification supersedes, your Honor, that the appeal board had this entire file and would consider the summation on the personal appearance, and that would reflect itself in their decision; but, that they did not have the correct recital of what occurred at the time, and therefore there would be a violation of procedural due process and the defendant would have lost a substantial right in that his file should have

contained a statement which is substantially correct as to what occurred.

THE COURT: Very well. I will hear evidence on whether or not the statement in the file appearing at—What is that page?

MR. SHIRE: Page 35, your Honor.

THE COURT: —at page 35 complies with the regulations. And what does the regulation require?

MR. SHIRE: 1624.2.

MR. REAL: Your Honor, that if there is information given, "Such information shall be in writing, or, if oral, shall be summarized in writing, and, in either event, shall be placed in the registrant's file."

THE COURT: Then, on the question here, the evidence should be directed, should it not, to whether any oral information was given and whether or not it was summarized in the file as required by the regulation?

MR. SHIRE: Yes, your Honor.

THE COURT: And that would direct our attention specifically to page 35 of Exhibit 1, as I understand it.

MR. SHIRE: Yes, your Honor.

Q Mr. Tomlinson, was there oral information given to the local board at your personal appearance?

• • •

[176]

MR. REAL: Counsel has indicated, and his offer is, that they are going to show that the board members had a predetermined consideration of this; that they treat all cases of this nature the same way. I think that is about the scope of the issues in this case.

MR. SHIRE: If your Honor pleases—

THE COURT: I have not ruled that it is admissible. I have merely ruled it is admissible to show what oral information, within the meaning of Regulation 1624.2, was

received at that personal appearance hearing.

MR. SHIRE: May I proceed, your Honor?

THE COURT: That is, information received by the board. I am not interested in anything else.

MR. SHIRE: Yes. I do not know if I am correct in following your Honor's ruling. I thought that the proper procedure would be, since this page 35 is already in evidence, to ask what was said at that time by the board members and by Mr. Tomlinson.

THE COURT: What was said by the board members is not information received by the board. What was said by someone else to the board members might constitute oral information.

MR. SHIRE: I believe, your Honor, that it would be proper to show, for instance, if a board member said, hypothetically: "Now, Joe Doaks, I have known you for a long time and I am just waiting to send you to Korea or China," or wherever it is, "because I want to marry your girl friend and this is my chance to do it."

THE COURT: If you have anything, in good faith, like that to offer, you may on that basis.

MR. SHIRE: I was attempting to give that as a hypothetical situation.

THE COURT: But I am not interested in retrying the hearing before the board, and we must limit ourselves.

MR. SHIRE: What I do have to offer, your Honor, is this, and I believe the evidence will show it: One of the members of the board said, "You are a Jehovah's Witness—".

THE COURT: Please proceed, Mr. Shire. Let us elicit the evidence instead of explaining so much what it may be.

MR. SHIRE: Very well, your Honor.

* * *

[179]

Q BY MR. SHIRE: Will you relate what you told the board at your personal appearance on November the 20th, 1950?

A Well, when I first went in, one of the board members said to me—

MR. REAL: I will object as to what he said. The answer is nonresponsive.

THE COURT: Sustained. Whose burden is it to summarize the oral information and place it in the file under this regulation?

• • •

[180]

THE COURT: And if there was anything in the information given to the board which he thinks was not covered in that exhibit, and then we will get it in that way.

I do not expect to hold a personal hearing of what happened before the local board in this trial, or a review of it.

• • •

[182]

Q Is there anything that was stated to you by the board or any member of the board as to show any prejudice against Jehovah's Witnesses?

MR. REAL: Your Honor, I will object to that question on the grounds it is irrelevant to the issues of this case.

THE COURT: It assumes facts not in evidence. Sustained.

Q BY MR. SHIRE: What did the member of the board say to you?

MR. REAL: The same objection, your Honor.

THE COURT: Sustained.

Q BY MR. SHIRE: Did any of the members of the board tell you that they classified all Jehovah's Witnesses in one way—

MR. REAL: Same objection.

Q BY MR. SHIRE: —and that they would classify you that way?

MR. REAL: Same objection, your Honor.

THE COURT: Sustained.

• • •

APPENDIX D

Statutes and Regulations Involved

Section 1(c) of the Act

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the Act

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by

reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from com batant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he

shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86.

Section 12(a) of the Act

Section 12(a) of the act (50 U. S. C. App. (Supp. B) § 462(a)) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment

for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

Section 1622.1(d) of the Regulations

Section 1622.1(d) of the Selective Service Regulations (32 C. F. R. § 1622.1(d) (1951 Rev.)) provides:

"General Principles of Classification.—. . . (d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Section 1622.14 of the Regulations

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14 (1951 Rev.)) provides:

"Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces."

Section 1624.2(b) of the Regulations

Section 1624.2(b) of the Selective Service Regulations (32 C. F. R. § 1624.2(b) (1951 Rev.)) provides:

"Appearance Before Local Board.— (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient

weight. The registrant may present such further information as he believes will assist the local board in determing his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Section 1626.25 of the Regulations

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25 (1951 Rev.)) provides:

"*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

"(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by vrtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower

than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the 'Minutes of Action by Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such

hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be found to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Regulations

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26 (1951 Rev.)) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

APPENDIX E

DISTRICT COURT OF THE UNITED STATES

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

20,543

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES J. RELYEA,

Defendant.

ORAL OPINION OF THE COURT

March 18, 1952

McNamee, J.

For the United States, ROBERT G. CRISANTI, Ass't U. S. Attorney
For the Defendant, RALPH RUDD, Esq.

THE COURT: At the time this case was presented to the court, at the conclusion of the evidence, I then formed a tentative but unexpressed judgment that the board acted without any rational basis for the classification made. However, as I probably indicated at the time I desired to examine the record to ascertain whether the tentative judgment which I had formed, but not stated, was supported by the evidence in the case. Mr. Rudd has asked leave to file brief, and did so. Mr. Crisanti filed an opposing brief. Other briefs followed. Incidentally, they were all excellent briefs on both sides, very good briefs.

So I have examined the briefs and I have re-examined the record in the case, and after such examination and re-examination I find that the judgment I entertained at the conclusion of the evidence has been fully confirmed.

I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war and participation in war in all its forms.

I think it is unnecessary to review the evidence. The case has been so thoroughly and completely briefed that counsel on both sides are familiar with the facts and the law applicable thereto.

It is the opinion of this court that the classification of this defendant as I-A-O is without any rational basis, and the defendant is therefore found not guilty and discharged.

UNITED STATES DISTRICT COURT

DISTRICT OF MONTANA

BUTTE DIVISION

No. 3616

UNITED STATES OF AMERICA

Plaintiff,

v.

DONALD LEE GODDARD

Defendant.

JUDGMENT OF ACQUITTAL

Filed and entered June 26, 1952.

This case having come on for trial on the 2nd day of June, 1952, and the plaintiff being represented by Dalton Pierson, Esq., United States Attorney for the District of Montana, and R. Lewis Brown, Jr., Esq., Assistant United States Attorney for the District of Montana, and the defendant being present in person and represented by his counsel E. Gardner Brownlee, Esq., and Thomas P. Koch,

Thereupon the defendant, with the approval of the Court and consent of the government, orally in open court and in writing filed herein, waived trail by jury and consented to trial by the Court.

Thereupon the case was submitted to the Court upon an agreed statement of facts, and

Thereupon counsel for the defendant moved the Court for a judgment of acquittal, stating the grounds upon which said motion was made, and the said motion was argued to the Court, and was by the Court taken under advisement;

Thereupon, after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class 1-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification.

WHEREFORE, by reason of the premises, the law and the evidence,

IT IS ORDERED AND ADJUDGED that the defendant's motion for judgment of acquittal be and the same hereby is granted; that the defendant be and he is acquitted of the offense charged in the indictment herein and that his bond be and hereby is exonerated.

Dated this 26th day of June, 1952.

W. D. MURRAY
United States District Judge.